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**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF ARIZONA**

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6 Roy and Josie Fisher, et al., No. CV-74-00090-TUC-DCB  
7 Plaintiffs

8 and

9 United States of America,  
10 Plaintiff-Intervenor,

11 v.

12 Tucson Unified School District, et al.,  
13 Defendants,

14 and

15 Sidney L. Sutton, et al.,  
16 Defendants-Intervenors,

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17 Maria Mendoza, et al., No. CV-74-0204-TUC-DCB  
18 Plaintiffs,

19 and

20 United States of America,  
21 Plaintiff-Intervenor,

22 v.

23 Tucson Unified School District, et al.  
24 Defendants.

25 **ORDER**

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1     Notice and Requests for Approval (NARA) of Grade Reconfiguration at elementary  
 2     schools Borman, Collier, Drachman, Fruchthandler and Sabino High School.

3       On November 16, 2015, TUSD filed the NARA proposing to add 6<sup>th</sup>-8<sup>th</sup> grades at  
 4     Borman K-5; 6<sup>th</sup> grade at Collier K-5; 7<sup>th</sup>-8<sup>th</sup> grades at Drachman K-6, 6<sup>th</sup> grade at  
 5     Fruchthandler K-5, and 7<sup>th</sup>-8<sup>th</sup> grades at Sabino High School. (NARA (Doc. 1869)). The  
 6     parties agreed to a briefing schedule as follows: 20 days from the filing date of the  
 7     NARA for the parties to file any objections previously raised with the Special Master; 20  
 8     days from the filing of any objections for TUSD to file a Response, simultaneously, with  
 9     the Special Master and the Court; the Special Master to have 10 days to file a Report and  
 10    Recommendation (R&R) and request expedited ruling within 30 days. The parties were  
 11    allowed five days after the filing of the R&R to file an objection to any new issue raised  
 12    in the R&R.

13       The parties filed Objections on December 7, 2015. TUSD responded on  
 14    December 23, 2015. The Special Master filed the R&R on January 6, 2016. On January  
 15    13, 2016, TUSD filed an objection to “new” issues raised in the R&R related to adding  
 16    7<sup>th</sup> and 8<sup>th</sup> grades at Sabino High School, which include: 1) whether the addition  
 17    improves integration at Sabino and Magee and does not exacerbate racial concentration;  
 18    2) whether the addition takes into account current and future patterns of choice; 3)  
 19    whether TUSD considered valid survey data indicating significant potential for  
 20    improving integration through incentive transportation with express buses; 4) whether the  
 21    7<sup>th</sup>-12<sup>th</sup> grade structure is not unusual, and 5) whether TUSD demonstrates a strong  
 22    likelihood for positive integrative impacts at Magee with outreach and recruitment efforts  
 23    to ensure the proposal does not negatively impact other USP obligations. TUSD asked  
 24    the Court to rule by February 5, 2016.

25       Changes which open new middle schools and move students from one school to  
 26    another are not easily undone. Missed opportunities to improve diversity may be missed  
 27    forever. And of course, changes exacerbating segregation must be avoided. The Court  
 28    grants the reconfiguration of Drachman, only. The NARA is denied for the remainder of

1 TUSD's proposed reconfigurations.

2 Reconfigure Drachman Elementary School K-6 to K-8.

3 Drachman K-6 Montessori is a nationally-recognized high-achieving magnet  
4 school located on the District's west side on S. 10<sup>th</sup> Avenue just north of W. 22<sup>nd</sup> St.  
5 Drachman is a racially concentrated school, with 75% Latino students and an incoming  
6 class that is 68% Latino. The plan is to use incentive "express bussing" for Anglo  
7 students from the north and east sides of the District to attend Drachman K-8. All parties  
8 agree that the likely impact of adding grades seven through eight at Drachman will  
9 improve integration and afford more students an opportunity to experience an integrated  
10 school environment.

11 Reconfigure Borman Elementary School K-5 to K-8

12 Borman elementary school is located on the Davis-Monthan Air Force Base  
13 (DMAFB). It serves children of military personnel and civil servants living and working  
14 on the base. Accordingly, many of the Borman students are not TUSD students and  
15 TUSD students cannot attend Borman unless their parents or grandparents are in the  
16 military. TUSD argues that adding the middle school at Borman would have virtually no  
17 impact on the surrounding middle schools because approximately 70% of the children  
18 attending Borman do not attend TUSD middle schools. After Borman, these students  
19 move to a charter K-8 on-base school or go to middle schools outside of TUSD. TUSD  
20 seeks to add grades six through eight to compete with the on-base charter school and to  
21 discourage students at Borman from going to middle schools outside TUSD.

22 The Court has seen this request before. In 2007, TUSD sought and was denied  
23 leave to open then recently closed Lowell Smith Elementary School as an on-base middle  
24 school. Then as now, TUSD hoped to compete with the on-base charter school and to  
25 prevent students from going to schools outside of TUSD. *See* (Order (Doc. 1209), *see also* (Notice of Reconsideration to Reopen Smith (Doc. 1264)). Then as now, the TUSD  
26 school serving DMAFB was Roberts-Naylor K-8, which is only 3.5 miles from the front  
27 gate of DMAFB. (Order (Doc. 1209)).

1       In 2007, Roberts-Naylor's student body was 82% minority, and it had "been  
 2 designated a failing school under AZLearns and as "underachieving" by the No Child  
 3 Left Behind Act." *Id.* at 2, 4. "The Arizona Department of Education had issued a  
 4 report describing its deficiencies, identifying needs and proven strategies to improve  
 5 student academic performance at Naylor Middle School." *Id.* (citation omitted).

6       According to Plaintiffs Fisher, Roberts-Naylor's student body is now 11% Anglo  
 7 making it a racially concentrated minority school. (Fisher Objection (Doc. 1877) at 7;  
 8 NARA (Doc. 1880) at 3, n. 5 (TUSD estimates its minority population at 80% (58%  
 9 African American; 22% Latino); (NARA (Doc. 1869), Ex. 2: Desegregation Impact  
 10 Analysis (DIA) at 2)).

11      Borman's Anglo student body is 54%. (NARA (Doc. 1869), Ex. 2: DIA at 4.)  
 12 Borman is an A school (2013-14 SY); Roberts-Naylor is a C school (2013-14 SY).  
 13 (Fisher Objection (Doc. 1880) at 7). TUSD estimates that 70% of the Borman Area  
 14 students may not attend TUSD schools after the 5<sup>th</sup> grade. (Doc. 1869) at 9 (citing Ex. 2  
 15 at 5-6.) According to TUSD the Borman proposal will not change anything; it neither  
 16 improves nor exacerbates ethnic imbalances. *Id.* It simply retains the status quo which  
 17 now exists through the 5<sup>th</sup> grade and extends it through to the 8<sup>th</sup> grade.

18      To address any impact on Roberts-Naylor K-8, TUSD proposes to add the  
 19 Advancement Via Individual Determination (AVID) program to improve its  
 20 attractiveness and enhance integration there. The AVID program prepares African  
 21 American and Latino students for success in core classes and Advanced Learning  
 22 Experiences (ALEs) such as Gate and pre-AP classes. (NARA (Doc. 1869) at 10 (citing  
 23 Ex. 2: DIA at 2)). TUSD justifies the Borman reconfiguration because it creates the  
 24 educational benefit of K-8 grades for Borman students. *Id.*

25      TUSD submits: What are at issue, here, are 36 students who currently will move  
 26 from Borman at the end of the 5<sup>th</sup> grade to non-TUSD schools. (NARA (Doc. 1869) Ex.  
 27 2: DIA at 6.) Approximately, 54% of these 36 students are Anglo: approximately 19  
 28 students. Adding AVID at Roberts-Naylor will not draw these students to Roberts-

1 Naylor because AVID is designed for minority students, not Anglo students. The  
2 addition of AVID may indirectly impact future integration by improving academic  
3 achievement at the school, which will make Roberts-Naylor a more attractive choice to  
4 all students including those now choosing to attend Borman, the on-base charter school  
5 and other non-TUSD schools. But, creating a middle school at Borman will ensure that  
6 Borman students will neither attend Roberts-Naylor's K-8 nor move to Roberts-Naylor in  
7 the 7th grade. Creating a middle school at Borman to afford its students the same K-8  
8 experience available to Roberts-Naylor students directly competes with Roberts-Naylor's  
9 marketing advantage over Borman, if all other things were equal.

10 TUSD submits the importance of adding middle school grades at Borman is to  
11 keep Anglo students from leaving TUSD schools and thereby becoming unavailable for  
12 the purpose of future integration efforts. (TUSD at 9.) In this case, TUSD must mean for  
13 purposes of integrating its high schools because they would attend Borman through the  
14 8<sup>th</sup> grade. Given the unique characteristics of the Borman students, TUSD does not  
15 explain why they would not continue to leave TUSD after completing school at Borman,  
16 whether that is in five or eight years. The plan to add grades 7 and 8 to Borman will  
17 attract and retain a student population which is 54% Anglo to attend Borman, a school  
18 which is the same.

19 Relevant to integration, the Court asks two questions. First, would approximately  
20 19 Anglo students make a difference to integration efforts at Roberts-Naylor. The second  
21 question is whether there are any strategies which would draw Borman student's to  
22 Roberts-Naylor instead of to the K-8 on-base charter school or to middle schools outside  
23 of TUSD. If any such strategies exist, this would increase the number of Anglo students  
24 at Roberts-Naylor beyond 19. Like the AVID program at Roberts-Naylor, adding even  
25 minority students from Borman would indirectly improve future integration by improving  
26 the overall academic environment at Roberts-Naylor because Borman is an A school.  
27 One educational opportunity not currently available at Borman but offered at Roberts-  
28 Naylor is K-8 grades. The USP requires more than just doing no harm, it requires TUSD

1 to take affirmative actions to do good in the context of improving integration and the  
2 quality of education for minority students, if it can. In other words, it is not ok for TUSD  
3 to base its Borman proposal on “current patterns of choice” if it has the means to change  
4 those choices. Roberts-Naylor is a racially concentrated school uniquely situated  
5 adjacent to DMAFB, an unusual source of Anglo students, which could affirmatively  
6 impact integration at Roberts-Naylor if they could be directed there. Until the Court is  
7 certain that Roberts-Naylor cannot be a viable K-8 program for Borman students, it will  
8 not approve a plan which will ensure Roberts-Naylor can never be such an alternative.

9 Since 2007, there have been measures proposed to improve the quality of  
10 education at Roberts-Naylor. Since 2007, TUSD has been trying to attract DMAFB  
11 students to TUSD schools. It is important to know the successes or failures TUSD has  
12 experienced given this history, and within that context assess whether there are any  
13 strategies that could be implemented at Roberts-Naylor to make it a viable K-8 option for  
14 students now attending Borman, the on-base charter school, or other non-TUSD middle  
15 schools. Then, if the conclusion is that Roberts-Naylor cannot be a viable K-8 option,  
16 then the addition of grades seven and eight at Borman can be established as having  
17 virtually no impact on Roberts-Naylor.

18 The Court asks TUSD to prepare a detailed report regarding the academic and  
19 demographic conditions at Roberts-Naylor and describe the measures, if any, which have  
20 been or could be taken by TUSD to transform Roberts-Naylor into a viable K-8 program  
21 capable of competing with the middle schools now attracting the Borman students.  
22 TUSD should explain why or why not it is feasible to implement any such identified  
23 measures. TUSD should consider a time line to accomplish a transformation at Roberts-  
24 Naylor sufficient to begin attracting students that currently choose to go elsewhere.  
25 TUSD shall provide its report to the Special Master and the Plaintiffs, with the Special  
26 Master preparing a supplement to his R&R in respect to adding grades 6 through 8 at  
27 Borman K-5.

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1     Reconfigure Collier K-5 and Fruchthandler K-5 to K-6 schools, and add a 7<sup>th</sup> and 8<sup>th</sup>  
 2     grade middle school at Sabino High School

3                 Like the Borman reconfiguration, the Court has previously seen this proposal. In  
 4 April 2015, TUSD filed a NARA to what it then described as an honors Fruchthandler-  
 5 Sabino pipeline. Then as now TUSD admitted it would draw Anglo students away from  
 6 Magee, but that Magee had a sufficient Anglo student population to withstand the loss of  
 7 white students. The Court denied TUSD's request to reconfigure these schools because  
 8 TUSD had failed to take a comprehensive look at its impact. (Order (Doc. 1799)). TUSD  
 9 has now taken that look and reurges the request.

10                 Currently, Collier and Fruchthandler students matriculate to Magee Middle School  
 11 for grades 6-8 and from there students living north of Magee move to Sabino High  
 12 School and students living south of Magee move to Sahuar High School. By opening a  
 13 new middle school at Sabino High School, TUSD would change the matriculation of  
 14 students from Fruchthandler and Collier schools. Glaringly missing from TUSD's DIAs  
 15 for these schools are their academic ratings, but TUSD tells the Court that Sabino High  
 16 School is an A school with a stellar reputation, and TUSD's website reflects that Sahuar  
 17 High School is a B school. The TUSD website reflects that Fruchthandler<sup>1</sup> and Collier  
 18 are B schools and Magee Middle School is a C school. *See* [www.Tusdstats.tusd.k12.az.us/paweb/aggd/schoolinfo/ShoolDetail.aspx](http://www.Tusdstats.tusd.k12.az.us/paweb/aggd/schoolinfo/ShoolDetail.aspx).

20                 The racial makeup of these schools tracks the racial makeup of the District with  
 21 Anglo neighborhoods lying to the northeast and minority neighborhoods sitting south and  
 22 west in the District. So, Sabino High School has a 54.8% Anglo student body, and  
 23 Sahuar High School's student body is 41.6% Anglo. Collier Elementary School's  
 24 Anglo students are 64.3%. Fruchthandler's Anglo students are 62.7%. Magee Middle  
 25 School's Anglo population drops to 44.5%. *See* [www.tusd1.org/contents/distinfo/deseg/Documents/AR15/AppendixII-11.pdf](http://www.tusd1.org/contents/distinfo/deseg/Documents/AR15/AppendixII-11.pdf).

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28                 <sup>1</sup> Fruchthandler was an A school. (Order (Doc. 1799) at 2.)

1       TUSD has promoted the reconfigurations as ways to create equity between the east  
2 and west sides of the District in respect to K-6 and K-8 programs, but addition of 6<sup>th</sup>  
3 grades at Collier and Fruchthandler elementary schools does not create parity with the  
4 opportunity afforded students on the west side and central portions of the district to stay  
5 at one school, K-8, until transitioning to high school.<sup>2</sup> The K-6 configuration still  
6 requires dual transitions from elementary school to middle school to high school. The  
7 only difference is that the transition occurs between 6<sup>th</sup> and 7<sup>th</sup> grade, instead of 5<sup>th</sup> and 6<sup>th</sup>  
8 grades.

9       The Court does not see TUSD's proposal to open a middle school as a transition  
10 saving measure. The DIA suggests that the middle school would be a separate school  
11 keeping the pre-teen 7<sup>th</sup> and 8<sup>th</sup> graders separate from the upper classmen. (NARA (Doc.  
12 1869), Ex. 6: DIA at 3), but see *id.* (suggesting cost reduction in transportation if 7<sup>th</sup> and  
13 8<sup>th</sup> graders ride with upper grades). The Special Master pointed out that TUSD is  
14 proposing an unusual structure to add 7<sup>th</sup> and 8<sup>th</sup> grades at a high school. TUSD responds  
15 that Basis Tucson North is 5<sup>th</sup>- 12<sup>th</sup> grades and provides a list of 13 other charter or  
16 private schools with some combination of 5<sup>th</sup> through 12<sup>th</sup> grades. (TUSD Objection to  
17 R&R (Doc. 1886), Ex. 1.) The Court is not convinced that small charter and private  
18 schools are good comparisons to a large public school like Sabino High with over 1,000  
19 high school students. TUSD has not discussed how the special developmental needs of  
20 7<sup>th</sup> and 8<sup>th</sup> graders will be addressed in a high school environment. After all, it was the  
21 unique character of 7<sup>th</sup> and 8<sup>th</sup> graders that drove the creation of middle schools in the  
22 first place. Except for transportation costs, TUSD appears to bundle the costs of the  
23 middle school into the Sabino High School operations. For example, there appears to be  
24 no separate administration or disciplinary program planned for these middle school  
25 students.

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27       <sup>2</sup> The west side has 10 K-8 schools; central Tucson has two K-8 schools, and the  
28 east side has two K-8 schools. The Court does not know the proportion of the District's  
students being served in these respective areas so the significance of the number of K-8  
schools in the respective areas is of limited value.

1       The Court is concerned about a hasty rush to simply add 7<sup>th</sup> and 8<sup>th</sup> grades at high  
2 schools in TUSD as a means to reduce transitions, if the better solution is to add 7<sup>th</sup> and  
3 8<sup>th</sup> grades to elementary schools. And, it appears TUSD is considering such plans.  
4 TUSD is also considering moving 7<sup>th</sup> and 8<sup>th</sup> grades coming from Cavett Elementary  
5 School to Catalina High School bypassing Utterback Middle School. (NARA (Doc.  
6 1869), Ex. Ex 7: DIA at 4). Unlike the Sabino High School reconfiguration, the Catalina  
7 High School reconfiguration would promote integration by shifting students from racially  
8 concentrated Utterback Middle School to the integrated high school. This might seem a  
9 handy integration device to move students from smaller school environments, which are  
10 by their nature harder to integrate, to larger high school environments, which generally  
11 are more integrated. But this would be a false assumption, if the middle schools being  
12 opened on high school campuses must be kept separate—then the larger integrated high  
13 school student bodies will not contribute towards an integrative experience for 7<sup>th</sup> and 8<sup>th</sup>  
14 graders.

15       TUSD reports that there are only two elementary schools remaining in TUSD with  
16 the capacity for becoming K-8 schools: Erickson and Lynn/Urquides. Beyond this  
17 information, TUSD does not address whether either of these two schools or any existing  
18 K-8 school in the District might be marketed to students on the north or east sides of the  
19 District. Again, TUSD analysis ignores the most important marketing tool for any  
20 school: academic achievement. The Court notes that where TUSD operates A-schools,  
21 students attend, including students outside that school's district and even from outside of  
22 TUSD. Sabino High School draws approximately 53% of its students from outside the  
23 school's attendance area, (NARA (Doc. 1869), Ex. 6: DIA at 2), and approximately 30  
24 students enter as 9<sup>th</sup> graders from outside TUSD, *id.* See also University High School  
25 and Dodge Middle School.

26       The Court does not agree with the Student Assignment Committee's conclusion  
27 that "virtually all of the central and west schools are racially concentrated so adding more  
28 students to them would not have an integrative effect." (NARA (Doc. 1869), Ex. 7: DIA

1 at 2.) It would so, if Anglo students were added at racially concentrated schools. A bus  
 2 traveling south travels the same distance as a bus traveling north: a mile is a mile. TUSD  
 3 conducted a survey of parents of 6<sup>th</sup> and 7<sup>th</sup> grade students currently attending racially  
 4 concentrated middle schools and asked if they would be interested in incentive  
 5 transportation to Sabino High School if the trip took between 45 minutes and one hour.  
 6 They responded affirmatively (NARA (Doc. 1869), Ex. 6: DIA at 13.) But,  
 7 Fruchthandler parents complained that traffic makes the travel time for the 4 mile trip  
 8 between Fruchthandler and Magee extremely long. ((NARA (Doc. 1869), Ex. 5: DIA at  
 9.)

10 TUSD also surveyed parents of 5<sup>th</sup> grade students at racially concentrated schools  
 11 and asked if an express bus were provided would they be interested in sending their  
 12 children to Magee Middle School and described it as having “strong academics and an  
 13 outstanding Odyssey of the Mind competition group,” or Fruchthandler, which is “a  
 14 highly performing school on the eastside of Tucson,” or Collier, which is “a tight-knit  
 15 community of learners on the northeast side of Tucson.” (Mendoza Objections (Doc.  
 16 1867), Ex. 2: Survey questions.) TUSD saw positive feedback here too.

17 Without more, the Court concludes that the positive feedback was due to parents  
 18 of students attending racially concentrated schools that Sabino was an A school and that  
 19 Magee had strong academics and an outstanding Odyssey of the Mind competition group,  
 20 and parents believed these schools would be superior to the school their child was  
 21 attending. The Plaintiffs and the Special Master point out that Magee Middle School is a  
 22 C school, a fact the Fruchthandler parents, whose children are targeted to attend it, are  
 23 more likely to know. Additionally, the Mendoza Plaintiffs question whether Magee can  
 24 even retain its current attractiveness because TUSD has recently placed its alternative to  
 25 long-term suspension program at Magee. (Mendoza Objection (Doc. 1876) at 9.) TUSD  
 26 responds that most parents are not aware of this, (Response (Doc. 1880) at 8). They will,  
 27 however, undoubtedly find out.

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1       The Court notes that all this is mere supposition when in fact, TUSD currently  
2 offers free incentive transportation to students at racially concentrated schools to attend  
3 schools where their attendance would have an integrative impact. In other words,  
4 students in racially concentrated schools may already attend Fruchthendler and Collier,  
5 Magee Middle School or Sabino High School and may use free incentive transportation  
6 services provided by TUSD to get there and back. TUSD says “only a handful” of  
7 students are currently attending these schools using TUSD’s incentive transportation  
8 program. (NARA (Doc. 1869) at 7.) The Mendoza Plaintiffs point out that only 699  
9 non-Anglo students district-wide utilized incentive transportation in 2014-2015. Using  
10 TUSD’s conservative 6% estimate of the 874 positive survey responses, TUSD believes  
11 express bussing will add approximately 100 minority students at Sabino, but the  
12 Mendoza Plaintiffs point out this would equal one seventh of all the non-white students  
13 who were provided incentive transportation in 2014-2015. (Mendoza Objection (Doc.  
14 1876) at 6); *see also* (NARA (Doc. 1869), Ex. 5: DIA at 3) (busses with 50 students each  
15 to Sabino); (NARA (Doc. 1869), Ex. 6: DIA at 7 (one bus with 40 students to Magee).  
16 The Plaintiffs and the Special Master’s point is that the survey responses are unreliable.  
17 (Mendoza Objection (Doc. 1876) at 5; Fisher Objection (Doc. 1877) at 14-16; R&R  
18 (Doc. 1884) at 2-3.)

19       The success of express busing is important because it provides the only  
20 opportunity for the Fruchthendler/Collier to Sabino reconfiguration to have any positive  
21 impact on integration whatsoever. If a child lives within the boundaries of a racially  
22 concentrated school and chooses to attend a school through open enrollment, he or she  
23 may be eligible for free transportation there depending on the demographics of the home  
24 school, the open enrollment school, and the student’s ethnicity. [www.tusd.k12az.us](http://www.tusd.k12az.us/contents/distinfo/deseg/schoolchoicecalculator.asp)  
25 /contents/distinfo/deseg/schoolchoicecalculator.asp. TUSD plans to add express bussing  
26 to its incentive transportation program to reduce travel time and increase the  
27 attractiveness of Collier, Fruchthendler, Magee, and Sabino schools. (NARA (Doc.  
28 1869) at 7.) TUSD also agrees to the Special Master’s suggestion for a controlled choice

1 admission plan which would link increased Anglo student enrollment to increased  
2 minority student enrollment. (Reply to R&R (Doc. 1886) at 8.) The Sabino Middle  
3 School is a three-year phase in plan with SY 2016-17 for planning, adding 7th grade in  
4 SY 2017-18, and adding 8th grade in SY 2018-19. TUSD will make a substantial  
5 investment in time and money on this proposed reconfiguration plan, which at best has  
6 tentative indicia of having any positive impact on integration. Unwinding it would be  
7 impossible in the event express bussing is not successful. And, the Court cannot ignore  
8 the dismal track record of minority student utilization of incentive busing in this very  
9 area.

10 Soon TUSD will have hard data proving how far middle school Anglo-students  
11 are willing to travel on express busses to attend an outstanding school, Drachman, which  
12 is also a racially concentrated school (75% Latino). (NARA (Doc. 1869), Ex. 4: DIA at  
13 4.) If Drachman is successful there is no reason to believe that other successes cannot  
14 follow. Nothing stops TUSD from introducing express busses from racially concentrated  
15 schools to Magee Middle School or to B elementary schools like Fruchthendler or  
16 Collier, or Sabino High School. Such bus routes would provide hard evidence regarding  
17 how many students will actually ride buses northeast and how far. Hard evidence is  
18 critical because any positive integrative affect from the Fruchthendler/Collier-Sabino  
19 reconfiguration hinges on express bussing.

20 The goal behind opening a middle school at Sabino High School is not to shift  
21 Anglo students away from Magee Middle School. Like the Borman plan, creating Sabino  
22 Middle School is aimed at attracting and retaining students on the northeast side of the  
23 District who currently do not go to any TUSD school and instead choose to go to charter  
24 schools or to go outside the District. Because these students are not going to Magee  
25 Middle School, TUSD reasons that securing their attendance at a new middle school  
26 located on the prestigious Sabino High School campus will not directly affect integration  
27 at Magee Middle School. On the flip side, attracting and retaining these students, who in  
28 the majority will be Anglo, will not improve integration of the majority Anglo student

1 bodies at Collier or Fruchthandler elementary schools or Sabino High School. (NARA  
 2 (Doc. 1869), Ex. 6: DIA at 4 (estimating that “almost all” 6<sup>th</sup> graders would transition to  
 3 Sabino). There is no evidence that these “new” students will be directed to any TUSD  
 4 schools to help integration and the intent is the contrary: TUSD intends that these  
 5 students will attend Fruchthandler, Collier, and Sabino—both middle school and high  
 6 school. There will be no new pool of potential attendees for the purpose of integrating  
 7 any other TUSD schools. This reconfiguration simply maintains the status quo.

8 In respect to integration, TUSD admits, based on current capture rates, that nine  
 9 students will go from Fruchthandler to Magee, (NARA (Doc. 1869), Ex. 5: DIA at 8, and  
 10 23 students will go from Collier to Magee, (NARA (Doc. 1869), Ex. 3: DIA at 8). The  
 11 difference in travel time does not explain the difference in matriculation because there are  
 12 four miles between Fruchthandler and Magee and 4.5 miles between Collier and Magee.  
 13 The estimated travel time, without traffic is approximately eight minutes. The trip  
 14 between Fruchthandler and Sabino High School is 7.5 miles, and Collier Elementary  
 15 School is only 2.2 miles from Sabino High School. TUSD expects all these students to  
 16 transition to Sabino. (NARA (Doc. 1869), Ex. 6: DIA at 4.) In other words, Magee  
 17 Middle School will lose 32 Anglo students.

18 Will this have a negative impact on integration at Magee Middle School? TUSD  
 19 says no. It will actually improve integration at Magee because it has a small enough  
 20 Hispanic student population (38.0%) that if some of its Anglo students (48 %) leave  
 21 Magee it will improve integration by boosting the Hispanic student ratio upwards towards  
 22 the +/- 15% definition for an integrated school under the Unitary Status Plan. While the  
 23 District asserts “**it is not advocating** for reducing any school’s white student population  
 24 as a desegregation strategy,” TUSD nevertheless asserts that if Magee’s white student  
 25 population was reduced to 28% and the Latino student population increased to 55%, “the  
 26 result would be **an Integrated School under the USP.**” (TUSD Response (Doc. 1880)  
 27 at 9) (emphasis in original).

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1       TUSD bases this argument on the +/- 15% allowance for integration, but ignores  
2 the end of the equation which is that if Anglo student enrollment falls below 38% Magee  
3 would not be integrated. The USP describes a racially concentrated school as: any school  
4 in which any racial or ethnic group exceeds 70% of the school's total enrollment. The  
5 USP describes an integrated school as: any school in which no racial or ethnic group  
6 varies from the district average for that grade level (elementary school, middle school, K-  
7 8, high school) by more than +/- 15 percentage points.

8       The +/- 15% rule, like the 70% cap rule, was designed to accommodate a District  
9 with an average 60% majority Hispanic student population and a small 23% Anglo  
10 student population and to account for some neighborhoods being almost exclusively one  
11 race. Neither rule was designed to produce a numeric integration goal; the USP does not  
12 require a school to attain integration status. The purpose of both rules was to allow  
13 TUSD to show positive integration in the face of overwhelming numbers of Latino  
14 students in a school. The rules work as follows. A school will be considered racially  
15 concentrated if the student body is more than 70% one minority. The +/- 15% formula  
16 produces a range within which a school may be considered integrated. At Magee Middle  
17 School, the 23% district-wide Anglo student average means that Anglo students should  
18 be at least 38% of the student body. They are 48%. The 62% district-wide Hispanic  
19 student average means that Hispanic students may make up 47% to 70% of the student  
20 population without Magee being considered racially concentrated. They are 35%.

21       Magee is not considered integrated within the context of the 15% margins, but that  
22 does not preclude this Court from recognizing that it has a healthy racial mix. Magee  
23 Middle School is uniquely located in TUSD to be in close proximity to both Anglo and  
24 Hispanic students. Middle class, predominately Anglo, neighborhoods lie north of  
25 Magee Middle School and lower socio-economic, predominately Hispanic,  
26 neighborhoods are south. This explains the balance of Anglo and Hispanic students  
27 there. The Court categorically rejects the notion that Magee Middle School's naturally  
28 integrated district must be skewed by a formula developed to account for schools in

1 TUSD that sit in predominately Anglo or predominately Hispanic neighborhoods. This  
2 Court will not advocate reducing the number of white students and increasing the number  
3 of Hispanic students at Magee Middle School as an integration strategy, especially here  
4 where the Anglo students are being shifted from a school where they make up 44.5% of  
5 the students to schools where they will make up over 60% of the students.

6       The real question is whether or not it impacts integration at Magee Middle School  
7 to create an A middle school at Sabino High School. TUSD admits the Sabino middle  
8 school will attract essentially all the Fruchthendler and Collier students. (NARA (Doc.  
9 1869), Ex. 6: DIA at 4.) There is no reason it will not attract other students interested in  
10 an A-school experience as well, especially those living nearest to it. Because Magee  
11 Middle School is not racially concentrated, express bussing will not be afforded its  
12 students to attend Sabino, therefore, its students will be left behind in a C school while  
13 Fruchthendler and Collier students move north for 7<sup>th</sup> and 8<sup>th</sup> grades at an A school. And,  
14 middle class families living north of Magee who can provide their own transportation  
15 will be better positioned to attend the A middle school planned at Sabino than lower-  
16 income Hispanic families residing south of Magee. And, if middle class families move  
17 their students to Sabino, whether they are Anglo or Hispanic, the level of academic  
18 achievement will decline at Magee Middle School. (R&R (Doc. 1884) at 5.) Admitting  
19 as much, TUSD advises that it will add AVID and AP programs at Magee to prepare  
20 African and Latino students for success in core classes and Advanced Learning  
21 Experiences (ALEs) such as GATE and pre-AP classes. (NARA (Doc. 1869), Ex. 6: DIA  
22 at 10). Is this enough? No.

23       Except for the argument rejected here that decreasing Anglo students and  
24 increasing Latino students at Magee Middle School will make it integrated, TUSD  
25 suggests no integrative value whatsoever to the reconfiguration of Fruchthendler and  
26 Collier elementary schools to add 6<sup>th</sup> grades there and open a new middle school at  
27 Sabino High School. Without a successful express bussing program there can be no  
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1 positive impact on integrating the TUSD school district. The reconfiguration brings new  
 2 Anglo students into TUSD to attend majority Anglo schools.

3 Just because these students do not currently attend TUSD schools, specifically  
 4 Magee Middle School, does not mean this plan will not impact integration efforts in  
 5 TUSD. Embarking on this plan closes the door for Magee Middle School or any other  
 6 existing TUSD school, with higher percentages of minority students than Sabino, to be  
 7 the subject of a plan to attract Anglo students currently not attending TUSD schools. The  
 8 Court recognizes no such school currently exists to compete with Sabino High School's  
 9 stellar A rating, but TUSD should consider whether the possibility exists for Magee  
 10 Middle School or any other TUSD school to become an attractive option. The integrative  
 11 impact of such a plan would substantially move the District towards unitary status  
 12 because it would simultaneously improve the academic quality of the school for the  
 13 minority students attending it.

14 As for mitigating measures, TUSD has not shown that express bussing will work  
 15 to move students from racially concentrated schools north. It has not shown that adding  
 16 AVID, ALE, GATE and AP-classes will improve academic achievement at Magee  
 17 Middle School. The Court approves TUSD's plan to try both. Except for Drachman,  
 18 TUSD has not considered the option of moving Anglo students south. TUSD has not  
 19 considered whether improvements could be made to any schools centrally located or to  
 20 the south of the District which would make them attractive K-8 schools for Anglo  
 21 students residing on the north side of the District.

22 The Court cannot find any positive impact on integration from the reconfiguration  
 23 of Fruchthandler/Collier elementary schools from K-5 to K-6, with a middle school  
 24 added at Sabino High School. The reconfiguration simply provides more opportunities to  
 25 Anglo students in predominately Anglo schools. As the Fisher Plaintiffs note: if White-  
 26 flight is a factor in the resistance by Anglo students to travel south in the TUSD district,  
 27 TUSD should reconsider a plan that would facilitate White-flight. (Fisher Objection  
 28 (Doc.1877) at 17.) After implementing express bussing and making improvements at

1 Magee Middle School, TUSD should be better positioned to consider the question of  
2 White-flight. As it now stands, the proposed reconfiguration will have a negative impact  
3 on integration at Magee Middle School, which while minor, is enough for this Court to  
4 deny the NARA given the other concerns outlined above.

5 **Accordingly,**

6 **IT IS ORDERED** that the Report and Recommendation (R&R) (Doc. 1884) IS  
7 ADOPTED IN PART AND REJECTED IN PART as follows.

8 **IT IS FURTHER ORDERED** that the NARA (1869) is APPROVED IN PART  
9 as to the reconfiguration of Drachman K-6 to a K-8 school.

10 **IT IS FURTHER ORDERED** that the NARA (1869) is NOT APPROVED IN  
11 PART as for TUSD's plan to reconfigure Borman K-5 to a K-8 school. TUSD shall  
12 prepare a detailed report regarding the academic and demographic conditions at Roberts-  
13 Naylor and describe the measures, if any, which have been or could be taken by TUSD to  
14 transform Roberts-Naylor into a viable K-8 program capable of competing with the  
15 middle schools now attracting the Borman students. TUSD should explain why or why  
16 not it is feasible to implement any such identified measures. TUSD should consider a  
17 time line to accomplish a transformation at Roberts-Naylor sufficient to begin attracting  
18 students that currently choose to go elsewhere. Within 30 days of the filing date of this  
19 Order, TUSD shall provide its report to the Special Master and the Plaintiffs, with the  
20 Special Master preparing a supplement to his R&R in respect to adding grades 6 through  
21 8 at Borman K-5. The Special Master shall a supplement to the R&R within 14 days of  
22 receiving TUSD's report. All parties may have 14 days to file objections to the Special  
23 Master's Borman supplement.

24 **IT IS FURTHER ORDERED** that the NARA is NOT approved to reconfigure  
25 Fruchthandler and Collier elementary schools to add the 6<sup>th</sup> grade and to add a middle  
26 school (7<sup>th</sup> and 8<sup>th</sup> grades) at Sabino High School. The Court approves the NARA in  
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1 respect to TUSD's plan to add express bussing and the AVID and AP programs at Magee  
2 Middle School and Advanced Learning Experiences (ALEs) such as GATE and pre-AP  
3 classes.

4 Dated this 8th day of March, 2016.

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David C. Bury  
United States District Judge

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